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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAN W. BAER et al.,

Plaintiffs, Cross-defendants and
Appellants,

v.

CLIFFORD DOUGLAS, as Trustee, etc.,

Defendant, Cross-complainant and
Respondent.

D057811

(Super. Ct. No. 37-2009-00083800-
CU-FR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

This case involves competing claims of trust deed lien priority. Plaintiffs and cross-defendants Dan and Cynthia Baer (together the Baers) and defendant and cross-complainant Clifford Douglas financed the purchase of a home by Michael and Wendy Monaco (together Monaco), who are not parties to this appeal. The Baers and Douglas made purchase money loans to Monaco, each in the same amount. Each of the two loans was secured by a deed of trust that was signed by Monaco on the same date and

encumbered the property Monaco purchased with the borrowed money, and the two virtually identical trust deeds—which differed only in that the Baers' trust deed referenced a higher loan number (No. 1235) than Douglas's trust deed (No. 1234)—were simultaneously recorded by the San Diego County Recorder's Office (County Recorder's Office). However, when the trust deeds were indexed in the county recorder's records, the Baers' trust deed was stamped with a lower instrument recording number and lower page numbers than the instrument number and page numbers stamped on Douglas's trust deed. Monaco defaulted on both of the secured purchase money loans, and the Baers and Douglas brought a declaratory relief action against each other claiming to have lien priority under their respective recorded and indexed trust deeds. Following a bench trial, the court entered judgment in favor of Douglas, ruling that Monaco's intent governed the lien priority determination and finding that Monaco intended to give to Douglas, not the Baers, the first-priority trust deed.

The Baers appeal, generally contending the judgment should be reversed and the matter remanded for retrial because the court "ignored well-established lien priority statutes and instead attempted to divine and apply the intent of the parties." The principal issue the Baers raise, which they correctly characterize as "a pure question of law,"¹ is whether the sequence of the instrument recording numbers stamped on the parties' "competing" trust deeds and the sequence of the page numbers where the trust deeds

¹ In their appellants' reply brief, the Baers acknowledge they are "not attack[ing] the sufficiency of the evidence below."

appear in the official records of the County Recorder's Office determine the lien priority of the trust deeds, and thus their trust deed lien has priority over Douglas's lien because their trust deed has a lower recording number and lower page numbers in the County Recorder's records. In addition, the Baers claim that Douglas, in his cross-complaint, "*conceded* [the Baers'] deed of trust was recorded first" and this "judicial admission" should determine lien priority. The Baers also raise what they assert is the "related question" of whether the court "had discretion to depart from the actual sequence of recording and instead assess priority based on the intent of the parties."

For reasons we shall discuss, we agree with the recent decision in *First Bank v. East West Bank* (2011) 199 Cal.App.4th 1309, 1316-1317 (*First Bank*)² holding that lien priority is not determined by the order in which simultaneously recorded trust deeds executed on the same day are *indexed*. We thus reject the Baers' contention that the order in which the Baers' and Douglas's trust deeds were indexed by the county recorder determines the relative priority of the trust deed liens. We also reject the Baers' contention that Douglas judicially admitted that their trust deed was recorded first and conclude the court did not err by determining lien priority based on the intent of the parties. Accordingly, we affirm the judgment.

² At this court's request, the parties submitted supplemental letter briefs on the applicability and significance of *First Bank, supra*, 199 Cal.App.4th 1309, which was decided after briefing had been completed in this matter.

FACTUAL BACKGROUND

As the Baers acknowledge, the pertinent facts are largely undisputed. The Baers and Douglas each loaned \$1,436,000 to Monaco through Michael Monaco's company, Sub500 Mortgage, Inc. (Sub500),³ to finance Monaco's purchase of a home (the property) located at 7563 Montien Road in San Diego. The purchase money loans were secured by two virtually identical trust deeds (hereafter separately referred to as Douglas's trust deed and Baers' trust deed) that encumbered the property Monaco purchased with the loaned funds and identified Fidelity National Title Insurance Company (Fidelity National Title) as the trustee and Sub500 as the original lender.

Monaco, as the borrower and trustor, signed both trust deeds on October 16, 2007. On that date Monaco, as the chief executive officer of Sub500, also signed an assignment of deed of trust (the Douglas trust deed assignment) that expressly transferred to Douglas "all beneficial interest under that certain Deed of Trust dated October 16, 2007 executed by [Monaco], Trustor, to [Fidelity National Title], Trustee, and recorded concurrently herewith" Both Douglas and the Baers thought they were going to receive a first trust deed by way of assignment from Sub500.

The two trust deeds and the Douglas trust deed assignment were all recorded by the County Recorder's Office at 3:09 p.m. on October 24, 2007, as shown by the official time stamp on each instrument. However, when the trust deeds were indexed in the County Recorder's records, the Baers' trust deed was stamped with a lower instrument

³ Sub500, like Monaco, is not a party to this appeal.

recording number (No. 2007-0677908) and lower page numbers (Nos. 6832-6848) than the recording number (No. 2007-0677910) and page numbers (Nos. 6851-6867) stamped on Douglas's trust deed. The Douglas trust deed assignment was stamped with instrument recording No. 2007-0677909. Monaco defaulted on both of the secured purchase money loans. Douglas initiated nonjudicial foreclosure proceedings.

At trial, Dan Baer acknowledged on cross-examination that defense exhibit No. 103 was a copy of an e-mail Michael Monaco sent to him at around 8:16 p.m. on October 18, 2007, which he received the next day, October 19. He also acknowledged that Monaco's e-mail made reference to his (Monaco's) "other investor" who might "take the first [trust deed] at [\$]1.4 million." Dan Baer also testified that "separate and apart from [that] e-mail," Monaco told him, at about the same time Monaco sent that e-mail, that he had an investor for the first trust deed, he had offered the first trust deed to someone other than the Baers, and he had a "done deal" with that other person for the first trust deed.

PROCEDURAL BACKGROUND

A. The Baers' Claim for Declaratory and Injunctive Relief

The Baers filed a second amended complaint (complaint) against Monaco, Sub500, Douglas, Fidelity National Title, and other named defendants, alleging various tort and equitable relief claims. As pertinent here, the fifth cause of action for declaratory relief in the Baers' complaint sought (1) a declaratory judgment that their trust deed had

priority over Douglas's trust deed, and (2) a preliminary and permanent injunction enjoining Douglas from conducting a nonjudicial foreclosure sale of the property.⁴

B. Douglas's Cross-Claim for Declaratory Relief

Douglas answered Baer's complaint after filing a cross-complaint against Monaco, Sub500, the Baers, Fidelity National Title, and other named defendants in which he alleged various tort and equitable relief claims. As pertinent here, Douglas's first cause of action for declaratory relief sought a declaratory judgment that his trust deed "is a first priority deed of trust and . . . is senior to the Baer[s'] deed of trust." In support of this claim, Douglas alleged in paragraph 3 of his pleading:

"[T]he escrow company erroneously and inadvertently recorded the Baers' deed of trust before [Douglas's] deed of trust. To clarify, both documents were presented to the Recorder's Office at the exact same time and were stamped with the exact same recordation date and time (October 24, 2007; 3:09 p.m.), and received consecutive instrument numbers, but the Baers' deed of trust inadvertently received the lower of the instrument numbers. Based upon this fact alone, and without any documentary evidence to support their claim, the Baers seek to subordinate [Douglas's] first priority deed of trust and obtain seniority that the Baers are not entitled to."

⁴ Specifically, regarding the fifth cause of action for declaratory relief, the Baers' complaint prayed for (1) a "declaratory judgment that the Assignment to the Baers of the Promissory Note for Loan Number **1235** carries with it the security interest in the First Deed of Trust (San Diego County Recorder's Office Document #2007-0677908), and that the Baers shall have priority as to [the] Promissory Note for Loan Number **1235** and Deed of Trust against the Property over Douglas' Deed of Trust;" and (2) a "preliminary and permanent injunction enjoining Douglas . . . from proceeding with a foreclosure sale of the Property on the basis of the First Deed of Trust."

C. The Baers' Successful Motion for a Preliminary Injunction

In September 2009, the court⁵ granted the Baers' motion for a preliminary injunction restraining Douglas during the pendency of this action from proceeding with "a trustee sale [of the property] under the Deed of Trust recorded as Document No. 2007-0677909."⁶

D. Bifurcated Bench Trial

The court bifurcated the Baers' declaratory relief claim against Douglas and Douglas's cross-claim for declaratory relief against the Baers from all other claims asserted in this matter and conducted a bench trial on those bifurcated claims. Both the Baers and Douglas submitted trial briefs. Stating that the "sole question" to be decided in the bifurcated trial was "the priority of the deed of trust," the court received numerous trial exhibits and heard the testimony of Dan Baer, Fidelity National Title's escrow officers Lisa Schultz and Staci Pawlowski, Fidelity National Title's title officer Jerry Digdigan, and Douglas.⁷

⁵ The Honorable Joan M. Lewis.

⁶ As noted, *ante*, the Douglas trust deed assignment was recorded as instrument No. 2007-0677909.

⁷ We do not summarize the testimony of the trial witnesses because, as the Baers expressly acknowledge in their appellants' reply brief, they "have not attacked the sufficiency of the evidence below" and "[t]he issue in this appeal is whether the instrument numbers have any bearing on lien priority."

1. *Decision and Judgment*

After taking the matter under submission, the court issued a written decision, stating, "[t]he court finds in favor of Douglas." After reciting the basic facts in this case, and noting that "[n]either party has been able to find any authority for the proposition that a lower document number or lower page number means that the deeds of trust were recorded in that order or that these numbers are a proper basis for determining priority," the court found that "[n]othing in [Government Code section 27320]"⁸—on which the Baers relied in support of their claim that the instrument recording numbers were significant in determining priority—"says that priority should be determined based on the identification numbers." Finding that, "in order to have simultaneous recordings the document numbers cannot be the basis for priority," the court stated that "the existence of a lower number does not give priority to the Baer deed of trust."

⁸ Government Code section 27320, which requires the recorder to record deposited instruments "without delay" with an "endorse[ment]" showing the "year, month, day, hour, and minute of its reception," and authorizes the assignment of nonsequential instrument numbers, provides: "When any instrument authorized by law to be recorded is deposited in the recorder's office for record, *the recorder shall endorse upon it in the order in which it is deposited, the year, month, day, hour, and minute of its reception*, and the amount of fees for recording. *The recorder shall record it without delay*, together with the acknowledgements, proofs, certificates, and prior recording data written upon or annexed to it, with the plats, surveys, schedules, and other papers thereto annexed, and shall note on the record its identification number, and the name of the person at whose request it is recorded. *Efforts shall be made to assign identification numbers sequentially, but an assignment of a nonsequential number may be made if not in violation of express recording instructions regarding a group of concurrently recorded instruments and if, in the discretion of the county recorder, such assignment best serves the interest of expeditious recording.*" (Italics added.)

Quoting *Bartley v. Karas* (1983) 150 Cal.App.3d 336, 341 (disapproved on another ground in *Petersen v. Hartell* (1985) 40 Cal.3d 102, 112), the court concluded that, "[w]here two instruments are recorded simultaneously, 'they should be held to take effect in such order as will best carry out the intent and secure the rights of all parties.' " The court noted that "both [the Baers] and Douglas intended to be in a first position," but found that "the intent of Monaco would govern" in this case and "Douglas should be first" because "a review of the escrow documents makes it clear that every document executed by Mr. Monaco, the borrower and the maker of the note and the trustor of the deed of trust provided that Douglas be in a first position." The court also reasoned that "[t]he escrow documents taken as a whole, the testimony of the escrow officer and the testimony of the title officer make it clear that the Douglas Deed of Trust and assignment were to be recorded first, ahead of the Baer Deed of Trust." Stating that "[i]t is clear the Douglas Deed of Trust was to have been the insured Deed of Trust and recorded first," the court determined that "the intent of the various parties to the escrow and their agents should be carried out and the Douglas Deed of Trust be deemed to be recorded first."

The court also found support for its decision in Civil Code section 3543, which provides:

"Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

Applying this maxim of jurisprudence,⁹ the court found that Douglas's trust deed "should be first" because the Baers were "far more negligent" than Douglas in that they "did not request that 'First Deed of Trust' be put on [their] Deed of Trust" and they "did not take any of the actions [they] could have taken to protect [themselves]; e.g., [they] did not ask to look at the escrow, [they] did not require an escrow for [their] transaction and after being told by the escrow officer that the [first trust deed] had funded made no effort to determine the priority status of that funded loan."

The court thereafter entered judgment in favor of Douglas. The Baers' timely appeal followed.

DISCUSSION

We shall address each of the Baers' three contentions following a discussion of the applicable standard of review and California's modified "first in time, first in right" system of lien priorities.

A. Standard of Review

Here, the decisive underlying facts, primarily the recording and indexing of the Baers' and Douglas's trust deeds and the intent of the trustor (Monaco) regarding lien priority, are undisputed. In such a case, in reviewing the propriety of the trial court's decision on the parties' claims for declaratory relief, we are confronted with questions of

⁹ See Civil Code section 3509 ("The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of [the Civil Code], but to aid in their just application.").

law that we address de novo. (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974.)

B. Overview of California Law Regarding Trust Deed Lien Priorities

California has adopted a "first in time, first in right" system of lien priorities, under which, as a general rule, liens on property "have relative priorities among themselves according to the time of their creation." (5 Miller & Starr, Cal. Real Estate (3d ed. 2009) Recording and Priorities, § 11:1, p. 11-11; see also Civ. Code, § 2897 ["[o]ther things being equal, different liens upon the same property have priority according to the time of their creation"].) A deed of trust "creates a lien on the described property when it is executed and delivered by the trustor . . . to the beneficiary" (5 Miller & Starr, *supra*, § 11:99, p. 11-293.)

The general rule that trust deed liens on property have relative priorities among themselves according to the time of their creation presumes that a subsequent trust deed lienholder has knowledge of the previously created liens; a person receiving a deed of trust on property acquires his or her lien "subject to all . . . previously created liens and encumbrances of which he or she has *actual or constructive knowledge*." (5 Miller & Starr, *supra*, §§ 11:1, pp. 11-11 to 11-12, original italics, 11:50, p. 11-169.)

This "first in time, first in right" system of lien priorities is modified by California's "race-notice" statutes, under which the subsequent lien interest of a lienholder (or encumbrancer) is generally given priority over a previously created lien interest where the subsequent lienholder acquires his or her lien interest for a valuable consideration, in good faith, and without knowledge or notice of the prior lien interest,

and records his or her lien interest before the previously created lien interest is recorded. (*First Bank, supra*, 199 Cal.App.4th at p. 1313; Civ. Code, §§ 1107, 1214;¹⁰ 5 Miller & Starr, *supra*, § 11:50, pp. 11-170, 11-171.) A subsequent trust deed lienholder who acquires his or her lien interest in this manner is known as a "bona fide encumbrancer." (5 Miller & Starr, *supra*, § 11:50, p. 11-170.) The subsequent lien interest of a bona fide encumbrancer "is subject to and junior to any prior *known* [lien] interests." (5 Miller & Starr, *supra*, § 11:3, pp. 11-18 to 11-19, italics added.)

"An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the Recorder's office, with the proper officer, for record." (Civ. Code, § 1170; see also 5 Miller & Starr, *supra*, § 11:21, p. 11-83 ["A properly acknowledged instrument that has been deposited with the recorder, and all of the statutory requirements for recordation have been satisfied, is deemed 'recorded' when it is filed with the recorder and the property fees are paid, even though it is not yet indexed and reproduced in the public record, or it is indexed improperly."].)

California courts have long recognized that constructive notice is a legal "fiction." (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1867 (*Lewis*).) Ordinarily a recorded document imparts constructive notice to subsequent purchasers or

¹⁰ Civil Code section 1107 provides: "Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded." Civil Code section 1214 provides in part: "Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded."

encumbrancers and precludes them from acquiring the property as bona fide purchasers or bona fide encumbrancers without notice, because the law conclusively presumes that a party acquiring an interest in property has notice of the contents of a properly recorded document affecting such property. (Civ. Code, §§ 1213,¹¹ 1214; *First Bank, supra*, 199 Cal.App.4th at p. 1314; *Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 452 (*Hochstein*).)

"For constructive notice to be conclusively presumed, the instrument or document must be 'recorded as prescribed by law.' " (*First Bank, supra*, 199 Cal.App.4th at p. 1314, quoting Civ. Code, § 1213 & citing *Hochstein, supra*, 219 Cal.App.3d at p. 452 & *Lewis, supra*, 30 Cal. App.4th at p. 1866.) The phrase "recorded as prescribed by law" in Civil Code section 1213 means the instrument must be *indexed*. (*Hochstein, supra*, 219 Cal.App.3d at p. 452; *First Bank, supra*, 199 Cal.App.4th at p. 1314, fn. 3 ["Civil Code section 1213, establishing how instruments impart constructive notice, uses the phrase 'recorded as prescribed by law,' meaning indexing."].) ""A document not *indexed* as required by statute (see Gov. Code, §§ 27230–27265), does not impart constructive notice because it has not been recorded 'as prescribed by law.'"" (*Hochstein, supra*, 219 Cal.App.3d at p. 452, italics added.) "For more than a century it has been the law in California that a party does not have constructive notice of a recorded instrument until

¹¹ Civil Code section 1213 provides in part: "Every conveyance of real property or an estate for years therein acknowledged or proved and certified and *recorded as prescribed by law* from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees." (Italics added.)

that document has been properly indexed so it can be located through a search of the public records." (*First Bank, supra*, 199 Cal.App.4th at p. 1314.)

"[R]ecording and indexing are separate and distinct functions." (*First Bank, supra*, 199 Cal.App.4th at p. 1316; *Ricketts v. McCormack* (2009) 177 Cal.App.4th 1324, 1327; see also *Lewis, supra*, 30 Cal.App.4th at p. 1866.)

C. Analysis

1. Sequence of indexing does not determine lien priority

We first reject the Baers' contention that the sequence of the instrument recording numbers stamped on the parties' trust deeds and the sequence of the page numbers where the trust deeds appear in the official records of the County Recorder's Office determine the lien priority of their competing trust deeds, and thus the Baers' trust deed lien has priority over Douglas's lien because their trust deed has a lower recording number and lower page numbers in the county recorder's records than the recording number and page numbers stamped on Douglas's trust deed.

We begin our analysis by noting that Monaco executed both deeds on the same date, October 16, 2007. We also note that, as shown by the county recorder's filing stamp on each trust deed and as the court found, the two trust deeds were recorded simultaneously on October 24, 2007 at 3:09 p.m. Specifically, each trust deed received the following stamp below the instrument recording number:

"OCT 24, 2007 3:09 PM
"OFFICIAL RECORDS
"SAN DIEGO COUNTY RECORDER'S OFFICE
"GREGORY J. SMITH, COUNTY RECORDER
"FEES: [\$]57.00"

In *First Bank, supra*, 199 Cal.App.4th 1309, the Court of Appeal recently rejected a contention virtually identical to the Baers' contention here. In that case, the plaintiff bank and the defendant bank granted loans to an individual and secured them with the purchased real property by means of trust deeds the borrower signed on the same date. (*Id.* at p. 1311.) Both lenders delivered their trust deeds to the recorder's office before business hours on the same date and the recorder time-stamped both trust deeds at 8:00 a.m. that day with the following: "Recorded/Filed in Official Records Recorder's Office, Los Angeles County, California 09/04/08 AT 08:00AM." (*Id.* at p. 1312.) Later that morning the recorder indexed defendant's recorded trust deed first; plaintiff's recorded trust deed was indexed later that day in the afternoon. (*Ibid.*) Plaintiff brought a declaratory relief action against defendant seeking a determination that its lien had priority over defendant's lien, and both parties moved for summary judgment on the issue of lien priority. (*Ibid.*) Plaintiff argued that both trust deed liens had equal priority because the trust deeds were recorded concurrently; defendant claimed that its trust deed lien had priority because its trust deed was *indexed* first. (*Ibid.*) The trial court granted plaintiff's motion and denied defendant's motion, holding the trust deeds were recorded concurrently and neither bank was a subsequent encumbrancer, with the result that the liens had equal priority. (*Ibid.*)

Defendant lender appealed, contending (like the Baers here) that lien priority is determined by the order in which the trust deeds are indexed; and, thus, its lien was first in time and had priority over the plaintiff lender's lien because its (defendant's) trust deed

was indexed earlier than the plaintiff's trust deed. (*First Bank, supra*, 199 Cal.App.4th at pp. 1312, 1316.) The Court of Appeal rejected this contention, holding that "priority . . . cannot depend on the time of indexing." (*Id.* at p. 1316, italics omitted.) The court first concluded that "because both trust deeds were executed on the same day and are deemed recorded simultaneously, neither bank is a subsequent [encumbrancer]." (*Ibid.*, citing Civ. Code, §§ 2897, 1107 & 1214 (discussed, *ante*).) Comparing the Government Code sections on recordation and indexing, the *First Bank* court observed the Legislature has "established recording and indexing as two separate functions" (*First Bank*, at p. 1316), and, therefore, "an instrument can be classified as 'recorded' before it is indexed." (*Id.* at p. 1317.) The court also noted "the Legislature imposes a time requirement on the duty of recording, but not on the task of indexing. Government Code section 27320 directs the recorder to 'record [an instrument] *without delay*,' and to endorse on it 'in the order in which it is deposited' the date, '*hour, and minute of its reception*'; but the Legislature has assigned no particular speed to indexing." (*First Bank*, at p. 1317.) The court reasoned that, "[c]learly, the fact the Legislature directs that recording be achieved expeditiously and identify the time of recording to the minute, indicates that it views recording as an extremely time-sensitive function. Meanwhile, the recorder is not required to index an instrument within any particular time. Therefore, *it would disrupt the statutory scheme to make priority turn on the random act of indexing, as defendant advocates, especially where banks and title insurers have no influence over when the recorder indexes trust deeds.*" (*Ibid.*, comparing *Dyer v. Martinez* (2007) 147

Cal.App.4th 1240, 1247 [recognizing the public "has no control over when the recorder indexes [a] document"], *italics added.*)

We agree with the holding and reasoning in *First Bank, supra*, 199 Cal.App.4th 1309 and conclude that neither the sequence of the instrument recording numbers stamped by the recorder on the parties' simultaneously recorded trust deeds, nor the sequence of the page numbers where the trust deeds appear in the official records, determines the relative lien priority of each trust deed. Given the fact that recording and indexing are statutorily segregated as two separate functions, the Legislature has directed that recording be achieved expeditiously but has not required the recorder to index a recorded instrument within any particular time, and the public has no control over when the recorder indexes a recorded document, making lien priority turn on the random act of indexing would disrupt the statutory scheme created by the Legislature. (*Id.* at pp. 1316-1317.) Accordingly, we reject the Baers' contention that their trust deed lien has priority over Douglas's lien because their trust deed has a lower recording number and lower page numbers in the county recorder's records than the recording number and page numbers stamped on Douglas's trust deed. Here, the Baers' and Douglas's trust deeds, like the trust deeds at issue in *First Bank*, were executed (and the resulting liens were created)¹² on

¹² We need not, and do not, reach Douglas's contention that "the Baers were not bona fide encumbrancers so they take subject to all matters of which they had notice, including Douglas' lien." The court's written decision shows the court did not address this issue and made no factual findings as to whether the Baers had prior actual, constructive, or inquiry notice of Douglas's loan to Monaco. In any event, the issue of whether the Baers had such prior notice is not pertinent to this appeal given the purely legal questions they have raised.

the same day, and they were simultaneously recorded before they were indexed. The question of which trust deed lien has priority is not determined by the order in which the county recorder indexed the two trust deeds.

2. *Douglas's pleading "admission"*

We next reject the Baers' contention that Douglas, in his cross-complaint, "*conceded* [the Baers'] deed of trust was recorded first" and this "judicial admission" should determine lien priority. In support of this contention the Baers, quoting only a portion of paragraph 38 of Douglas's cross-complaint, assert that "Douglas pled: 'The recordation of the subject deeds of trust was not accomplished as instructed . . . the Baer Deed of Trust was inadvertently *recorded first* . . . then the Douglas Deed of Trust.'" (Italics added.)

By selectively quoting only a portion of paragraph 38 of Douglas's cross-complaint, the Baers suggest that Douglas judicially admitted in his pleading that the Baers' lien has priority over Douglas's lien because Baers' trust deed was "recorded first" and that this "judicial admission" is binding on appeal. Such creative use of Douglas's pleading is unavailing. Paragraph 38 of Douglas's cross-complaint states in full:

"The recordation of the subject deeds of trust was not accomplished as instructed. All three instruments¹³ were *simultaneously presented to the San Diego County Recorder's Office at the same time, and have the same date and time stamp (October 24, 2007; 3:09 pm)* but *the Baer Deed of Trust was inadvertently recorded first*, followed by the Douglas [Trust Deed] Assignment, then the Douglas Deed of Trust; and these three instruments received

¹³ Paragraph 37 of Douglas's cross-complaint shows the Douglas trust deed assignment (discussed, *ante*) is the third instrument to which paragraph 38 refers.

consecutive instrument numbers from the San Diego County Recorder's Office." (*Italics added.*)

We have already concluded the undisputed facts establish the Baers' trust deed and Douglas's trust deed were simultaneously recorded. The foregoing full text of paragraph 38 of Douglas's pleading demonstrates he pleaded facts showing the two trust deeds were simultaneously recorded at 3:09 p.m. on October 24, 2007, and he used the word "recorded" in the phrase "the Baer Deed of Trust was inadvertently recorded first" to mean that the Baers' trust deed was *indexed* first. Accordingly, we reject the Baers' claim that Douglas judicially admitted their lien has priority over his lien because the premise of this claim—that the Baers' trust deed was recorded first—is not supported by the record.

3. *Discretion to determine lien priority based on intent*

Last, we also reject the Baers' contention that, "as a matter of law," the court did not have "discretion to depart from the actual sequence of recording and instead assess priority based on the intent of the parties."¹⁴ As a preliminary matter, we shall assume the Baers' use of the phrase "actual sequence of recording" is intended to mean "actual sequence of *indexing*," given the Baers' principal contention in this appeal that the sequence of the instrument recording numbers stamped on the parties' trust deeds and the sequence of the page numbers where the trust deeds appear in the official records of the County Recorder's Office determine the lien priority of the trust deeds.

¹⁴ In their appellants' reply brief, the Baers ask this court to determine "whether *as a matter of law*, Monaco's intent . . . has any bearing on lien priority."

The courts in California have considered the intent of the grantor in resolving trust deed lien priority disputes in cases involving concurrently executed and recorded trust deeds. For example, in *Phelps v. American Mortgage Co.* (1936) 6 Cal. 2d 604, overruled in part on other grounds by *Firato v. Tuttle* (1957) 48 Cal.2d 136, two trust deeds on the same property—one (the \$125,000 trust deed) securing payment of promissory notes in the amount of \$125,000, and the other (the \$60,000 trust deed) securing payment of a \$60,000 promissory note—were executed on the same day and presented for recordation the next day. (*Phelps*, at pp. 605-606.) Although the \$125,000 trust deed was intended to be the first lien trust deed, as that deed of trust recited (*id.* at p. 605), it was indexed in book No. 6545 of the Official Records of Los Angeles County, and the \$60,000 trust deed, which was intended to be the second lien trust deed, was indexed in a lower-numbered book (No. 6461). (*Id.* at p. 606.) The trial court found the \$60,000 trust deed lien was senior to the \$125,000 trust deed lien because the \$125,000 trust deed was indexed in a higher-numbered volume in the official records. (*Id.* at p. 608.)

The California Supreme Court in *Phelps* reversed the judgment entered in favor of the plaintiffs, explaining that "the order of recording the deeds of trust executed concurrently and *intended . . . to be first and second liens in the reverse order of the record sequence*, does not militate against the plaintiffs' claims nor excuse the effect of notice, either actual, or constructive by virtue of the specific provisions appearing on the face of the instruments of record." (*Phelps, supra*, 6 Cal. 2d at pp. 609-610, italics added.) Noting that "[t]he time of the day when the concurrent deeds of trust, both filed

for record on November 23, 1926, were offered for that purpose does not appear," the high court held that, "[i]f they were filed at the same time or in their proper order and the reverse order of recordation was an inadvertence, *that mistake . . . should not be permitted to alter the intended relations of the parties . . .* when an examination of the recorded documents would provide notice of the true priorities." (*Id.* at p. 609, italics added.)

Here, although neither of the concurrently executed and recorded trust deeds indicates on its face the relative priority of the lien created thereby, the trial court acted within its legal discretion when it considered the evidence of the grantor's intent in order to resolve the trust deed lien priority dispute presented in this case. (See *Phelps, supra*, 6 Cal. 2d at p. 609.)

For all of the foregoing reasons, we affirm the judgment.

DISPOSITION

The judgment is affirmed. Douglas shall recover his costs on appeal.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.